

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 STEVEN B. SMITH and BRADLEY
14 ALEXANDER GEORGE GARNER,

15 Defendants.

CASE NO. CR09-5088BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
SUPPRESS AND GRANTING
IN PART AND DENYING IN
PART DEFENDANT
GARNER'S MOTION FOR
DISCOVERY ORDER

16
17
18 This matter comes before the Court on Defendants' motion to suppress (Dkt. 47)
19 and Defendant Garner's motion for discovery order (Dkt. 69). The Court has considered
20 the pleadings filed in support of and in opposition to the motion, heard the testimony of
21 witnesses and oral arguments of counsel, considered the remainder of the file, and hereby
22 grants in part and denies in part both motions for the reasons stated herein.

23 **I. FACTUAL AND PROCEDURAL BACKGROUND**

24 On November 17, 2008, Plaintiff United States of America filed a criminal
25 complaint against Defendants Steven B. Smith and Bradley Alexander George Garner
26 alleging violations of Sections 1343, 1346, and 1349 of U.S.C. Title 18. Dkt. 1. On
27 March 19, 2009, Defendants were charged in a four-count Superseding Indictment with
28

1 wire fraud and theft of honest services in violation of 18 U.S.C. §§ 1343 and 1346, mail
2 fraud in violation of 18 U.S.C. § 1341, and unlawful monetary transaction in violation of
3 18 U.S.C. § 1957. Dkt. 36.

4 On November 19, 2008, U.S. Army CID James T. Loeffler obtained a search
5 warrant for the premises known as 79-800 Avenue 42, Bermuda Dunes, CA 92203. Dkt.
6 48 at 10. The warrant contained an attachment that described the location and areas to be
7 searched, which reads as follows:

8 The premises to be searched, hereinafter referred to as the
9 “GARNER BERMUDA DUNES AIRPORT HANGAR” and “GARNER
10 BERMUDA DUNES ROYAL LIMOUSINE SERVICE OFFICE,” are
11 more particularly described as follows:

12 The PREMISES TO BE SEARCHED consists of the common and
13 privately leased areas of 79-880 Avenue 42, Bermuda Dunes, CA 92203,
14 commonly known as the Bermuda Dunes Airport; privately leased areas
15 leased by Bradley Alexander George Garner and/or the business ROYAL
16 LIMOUSINE SERVICE, entirely owned by Bradley Alexander George
17 Garner. Common areas to include areas ROYAL LIMOUSINE SERVICE,
18 employees of, and BRADLEY ALEXANDER GEORGE GARNER would
19 have access to. Described as an aircraft hangar, which is one of three
20 aircraft hangers on the property of Bermuda Dunes Airport. The GARNER
21 BERMUDA DUNES AIRPORT HANGAR is situated on the eastern most
22 side of the airport. The hangar has no visible distinctive marking, but is a
23 tan hangar with brown trim. The hangar is approximately 300 feet in length
24 by approximately 80 feet in width. On the south-east wall there is an
25 unidentified orange systems box and a gray electrical box. There is a whit
26 door on the south side. Immediately to the south of the structure there is a
27 small fenced enclosure, containing fuel storage tanks that are surrounded by
28 green vegetation. On the east side there are large hangar doors which open
to the concrete apron leading to the airport runway. Photographs of the
structure exposed during surveillance date 18 nov. 08, depicting GARNER
outside the structure are attached in Attachment A.

Dkt. 48 at 45 (emphasis in original).

Mr. Garner states that the search proceeded as follows:

On November 19, 2008, Special Agent Jason Loeffler of the U.S.
Army Criminal Investigations Division submitted an application and
affidavit to obtain a warrant to search the “Garner Bermuda Dunes Airport
Hangar” and the “Garner Bermuda Dunes Royal Limousine Service
Office.” See Ex. C to Declaration of Lyle A. Tenpenny (search warrant,
affidavit, and related papers). While this language refers to Royal
Limousine’s “office,” SA Loeffler’s affidavit particularly describes the
place to be search only “as an aircraft hangar, which is one of three aircraft
hangars on the property of Bermuda Dunes airport” and further notes that
Mr. Garner’s hangar “is situated on the eastern most side of the airport” and
“has no visible distinctive markings, but is a tan hangar with brown trim.”

1 *Id.* The search warrant affidavit describing the place to be searched
2 includes a picture of the hangar space the agents sought to search, but
3 contains no picture of the trailer (which is some distance from the hangar)
4 that was searched. In fact, at an evidentiary hearing, the agents who
5 conducted the search would be expected to confirm that the trailer is a 5 to
6 7 minute walk from the hangar. In other words, the trailer is not adjacent
7 to, or within the immediate environs of, the hangar described in the
8 affidavit. In fact, there is no reference at all in the search warrant affidavit
9 to the trailer that the federal agents searched.

10 In a April 8, 2009 telephonic discovery conference, AUSA David
11 Jennings acknowledged having received a call on the day of the search from
12 agents, who relayed the discovery that Mr. Garner's office was in a
13 detached mobile trailer he owned, which was located elsewhere on the
14 airport grounds. See Tenpenny Decl. ¶ 4. Upon receiving this call from the
15 case agent, AUSA Jennings told the agent that the government would obtain
16 a separate warrant to search the trailer. *Id.* SA Loeffler then informed
17 AUSA Jennings that agents had already entered and seized records from the
18 trailer. *Id.* Recognizing the issue, AUSA Jennings instructed the agents to
19 segregate the materials seized from the trailer from the other materials
20 seized from the airport that day. *Id.*

21 Dkt. 47 at 3-4. In its brief, Plaintiff concedes that Mr. Garner "correctly states the facts
22 regarding the search" Dkt. 55 at 3.

23 On April 9, 2009, Defendant Garner filed a Motion to Suppress Certain Evidence
24 Seized from Bermuda Dunes Airport. Dkt. 47. On April 16, 2009, Plaintiff responded.
25 Dkt. 55. On April 17, 2009, Defendant Smith joined in Mr. Garner's motion. Dkt. 56.

26 On April 22 and 23, 2009, the Court held an evidentiary hearing on this motion.
27 Dkts. 64 and 70.

28 On April 23, 2009, Defendant Garner filed a Supplemental Memorandum in
support of his motion. Dkt. 66. On April 24, 2009, Defendant Garner filed a Notice of
Discovery Violation Relating to Motion to Suppress Evidence Seized at Bermuda Dunes
Airport and Request for Discovery Order. Dkt. 69. Defendant Garner attached to the
notice an email from government agent Paul Blake. *Id.* at 14. Agent Blake appears to
have sent the email on November 20, 2008, shortly after participating in the airport
search. *Id.* Defendant Garner claims that he received the email the day after the
evidentiary hearing was completed. *Id.* at 2. With regard to the substance of the email,
Agent Blake expresses his concern that the warrant was served "without everyone taking
the time to read it" and that the trailer was outside the scope of the warrant. *Id.* at 14-15.

II. DISCUSSION

A. Fourth Amendment Reasonableness

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. A search is unreasonable under the Fourth Amendment, and thus unconstitutional, if it is performed without proper judicial authorization. *See Groh v. Ramirez*, 540 U.S. 551, 562-63 (2004). To determine whether the search of a specific location is within the scope of a valid warrant, courts consider “an objective assessment of the circumstances surrounding the issuance of the warrant, the contents of the search warrant, and the circumstances of the search.” *United States v. Hurd*, 499 F.3d 963 (9th Cir. 2007) (citations omitted).

In this case, the parties disagree as to whether the agents properly executed the search warrant. Defendants argue that the search of the trailer at the airport violated their constitutional rights because the trailer was outside the scope of the warrant. Dkt. 47 at 4-6; Dkt. 59 at 3-4. Plaintiff concedes that:

The Bermuda Dunes search warrant accurately described the business to be searched, and accurately described that it was on the airport premises, but inaccurately described that the business was believed to be primarily located in a hangar.

Dkt. 55 at 6. Moreover, Plaintiff argues that “[h]ad the warrant contained a single sentence that the Royal Limousine Office was believed to be in a portable trailer, located somewhere on the airport premises, there would be no issue here.” *Id.* at 7. The Court agrees as to the absence of a particular sentence in the search warrant and finds that the warrant does not describe with particularity that the Royal Limousine Office would be found outside of, or a significant distance away from, the leased airport hangar. Therefore, the Court finds that the search of the Royal Limousine Office trailer violated Defendants’ Fourth Amendment rights to be free from unreasonable searches.

Plaintiff argues that suppression of the evidence obtained is not an automatic consequence of an unreasonable search. Dkt. 55 at 7-9. Plaintiff asserts that the Court

1 should rely on the good faith exception announced by the Supreme Court in *United States*
2 *v. Leon*, 468 U.S. 897 (1984). Defendants counter with the Tenth Circuit's holding in
3 *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006), that the *Leon* exception does not
4 apply when "the problem lies in the execution, and not the constitutionality, of the search
5 warrant." *Id.* at 746. Although the Court is unaware of any direct Ninth Circuit support
6 for this proposition, the Circuit did explicitly distinguish the *Angelos* holding in *United*
7 *States v. Hurd*, 499 F.3d 963, 969 n. 6 (9th Cir. 2007). In *Hurd*, the court upheld the
8 district court's denial of the defendant's motion to suppress finding that "it was
9 objectively reasonable for Officer Clifton to believe that Judge Kurshner authorized the
10 search of Hurd's residence, despite [Judge Kurshner's] failure to initial the appropriate
11 line on the search warrant." *Id.* at 969. Specifically, the defendant argued that this
12 holding would create an inter-circuit conflict with *Angelos*, but the court disagreed and
13 stated that *Angelos* was "readily distinguishable."

14 In this case, the Court finds that the execution of the search warrant was more
15 similar to the *Angelos* scenario rather than the *Hurd* scenario. In other words, it was
16 objectively unreasonable for the officers conducting the search to understand that the
17 scope of the search warrant contemplated that the Royal Limousine Office would have
18 been found outside of, and a significant distance from, the leased airport hangar.
19 Therefore, the Court finds that the *Leon* good faith exception does not apply to overcome
20 the suppression of the evidence seized from the trailer in violation of the Defendants'
21 constitutional rights.

22 **B. Extent of Suppression**

23 "Ordinarily, only evidence that is obtained in violation of a warrant is
24 suppressed." *United States v. Chen*, 979 F.2d 714, 717 (9th Cir.1992). However, "in
25 cases where there is 'flagrant disregard' for the terms of the warrant, the district court
26 may suppress all of the evidence, including evidence that was not tainted by the
27 violation." *Id.* Wholesale suppression is an "extraordinary remedy" that is appropriate
28

1 “only when the officers transform the search into an impermissible general search by
2 ignoring the terms of the warrant and engaging in indiscriminate fishing.” *Id.*

3 In this case, Defendants request that the Court suppress all the evidence seized
4 from the Bermuda Dunes Airport search because the agents conducted the search in
5 flagrant disregard of the terms of the warrant. Dkt. 66 at 1. Although the Court finds that
6 the agents conducted an unconstitutional search outside the particular terms of the
7 warrant, the Court does not find that the agents conducted an impermissible general
8 search that can be characterized as indiscriminate fishing. In fact, the warrant states that
9 the agents were authorized to search the Royal Limousine Office if the office was inside
10 the particularly described hangar. The fact that the agents searched the office that was
11 located in a trailer some distance away from the airport hangar does not show that they
12 conducted a “general search” of the airport. Moreover, the Court finds that the agents did
13 not conduct an “indiscriminate fishing” expedition when they searched this trailer office.
14 Therefore, the Court denies Defendants’ request to suppress all of the evidence that was
15 seized from the search of the Bermuda Dunes Airport.

16 **C. Discovery Order**

17 Defendant Garner requests that:

18 In light of the production of Agent Blake’s email, Mr. Garner
19 requests that the Court enter an order directing each agency involved in the
20 Bermuda Dunes Airport search to produce all notes, email, memoranda,
21 reports or other documents relating to the search. The order should also
22 require the agent-in-charge of each office involved in the search to sign a
23 certification that a diligent search for such materials has been conducted
24 and that all materials as a result of that search have been produced to the
25 prosecutor for delivery to the defense.

26 Dkt. 69 at 4. With regard to the former request, Plaintiff informed the Court during a
27 conference call that it is implementing measures to comply with this request despite the
28 current absence of a Court order. In light of the late discovery of Agent Blake’s email,
the existence and non-disclosure of a video from the search, and the fact that Defendants
have received nothing from the lead agent, Agent Loeffler, from this search, the Court
finds that it is necessary to enter an order specifically requiring Plaintiff to comply with

1 its discovery obligations as to this particular search. Therefore, the Court grants
2 Defendant Garner's motion as to this request.


3 On the other hand, the Court finds that it is unnecessary, at this time, to order
4 every agent-in-charge to certify that a diligent search for such materials has been
5 conducted. Therefore, the Court denies Defendant Garner's motion as to this request.

6 **III. ORDER**

7 Therefore, it is hereby

8 **ORDERED** that Defendants' motion to suppress (Dkt. 47) is **GRANTED in part**
9 and **DENIED in part** as stated herein and that Defendant Garner's motion for discovery
10 order (Dkt. 69) is **GRANTED in part** and **DENIED in part** as stated herein.

11 DATED this 27th day of April, 2009.

12
13
14 
15 BENJAMIN H. SETTLE
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28